## Before the **FEDERAL COMMUNICATIONS COMMISSION**

Washington, DC 20554

Closed Captioning of Internet Protocol-Delivered	)
Video Programming: Implementation of the	) MB Docket No. 11-154
Twenty-First Century Communications and Video	)
Accessibility Act of 2010	)

To: The Commission

### PETITION FOR RECONSIDERATION OF THE CONSUMER ELECTRONICS ASSOCIATION

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Pursuant to Section 1.429 of the Commission's rules. the Consumer Electronics Association ("CEA") respectfully petitions the Commission to reconsider three narrow aspects of the recent *IP Captioning Order*.<sup>2</sup>

#### I. INTRODUCTION AND SUMMARY

CEA recognizes and applauds the Commission's vision and hard work in crafting the IP Captioning Order to implement Sections 202 and 203 of the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"), which amended the Communications Act of 1934 (the "Act"). In many areas, the *IP Captioning Order* successfully follows Congress's intent and strikes the required balance between accessibility and innovation in the closed captioning rules applicable to apparatus ("apparatus closed captioning rules" or "new rules") adopted pursuant to Section 203 of the CVAA. However, CEA seeks reconsideration of three aspects of the new rules.

<sup>&</sup>lt;sup>1</sup> 47 C.F.R. § 1.429.

<sup>&</sup>lt;sup>2</sup> Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Report and Order, 27 FCC Rcd 787 (2012) ("IP Captioning Order"). CEA participated in the proceeding leading to adoption of the IP Captioning Order, filing both comments and reply comments.

<sup>&</sup>lt;sup>3</sup> Pub. L. No. 111-260, §§ 202, 203, 124 Stat. 2751, 2767-2773 (2010).

First, CEA urges the Commission to limit the applicability of the apparatus closed captioning rules to only those devices intended by the manufacturer to receive, play back, or record video programming, rather than broadly applying these rules to any device with a video player (*e.g.*, digital still cameras and consumer video cameras or "camcorders"). The Commission should reconsider the current formulation of Section 79.103 and limit covered apparatus to only those devices that include "video programming players," rather than undefined "video players," as provided in the note to Section 79.103(a). A "video programming player" should be defined as a component, application, or system that specifically enables access to video programming, not video content in general.

Second, CEA requests that the Commission reconsider the finding in the *IP Captioning Order* that standalone removable media players (*e.g.*, Blu-ray Disc<sup>TM</sup> and DVD players) are apparatus covered by Section 79.103. There are strong public policy reasons against subjecting removable media players to the new rules, especially because the content on the media that these players need to operate is not required to be closed captioned. Reconsideration will benefit all consumers by saving substantial, unnecessary industry compliance costs. The *IP Captioning Order*'s interpretation of the phrase "transmitted simultaneously with sound" is inconsistent with Congressional intent and Commission precedent, and is unnecessary to satisfy the requirements of the CVAA and the Act. Fundamentally, however, the *IP Captioning Order*'s treatment of removable media players exceeds the Commission's authority.

Third, CEA urges the Commission to clarify that the January 1, 2014 compliance deadline refers specifically to the date of manufacture, so that apparatus manufactured on or after January 1, 2014 are subject to the new rules, without affecting the importing, shipment, or sale in the United States of apparatus manufactured before that date. The requested clarification will

simplify manufacturers' compliance with the apparatus closed captioning rules without limiting the accessibility of new apparatus. Moreover, the requested clarification is consistent with the Commission's past practice regarding equipment compliance deadlines.

# II. CONSISTENT WITH THE CVAA, THE COMMISSION SHOULD NARROW THE SCOPE OF SECTION 79.103 TO COVER ONLY APPARATUS THAT INCLUDE "VIDEO PROGRAMMING" PLAYERS

The *IP Captioning Order* exceeds the Commission's statutory authority by failing to apply the new rules only to those apparatus that contain a "video programming" player. The Commission reasonably finds that the term "apparatus" includes software as well as hardware. However, the *IP Captioning Order* adopts an irrationally broad definition of covered "apparatus" that includes any device with a "video player. Consistent with the limited scope of Section 303(u) of the Act, as amended by Section 203 of the CVAA, the Commission must ensure that the new rules only reach apparatus intended by the manufacturer to receive or play back "video programming," not any video content such as consumer-generated media, which the CVAA

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<sup>&</sup>lt;sup>4</sup> The facts and arguments raised by CEA related to this issue are appropriately raised in this petition for reconsideration because they respond to the overly broad application of the apparatus closed captioning rules as adopted for the first time in the *IP Captioning Order*. See 47 C.F.R. § 1.429(b)(1), (2). Moreover, consideration of these facts and arguments serves the public interest by helping ensure the Commission does not act in an *ultra vires* manner. See id. § 1.429(b)(3).

 $<sup>^5</sup>$  IP Captioning Order, 27 FCC Rcd at 839-840 ¶ 93.

<sup>&</sup>lt;sup>6</sup> *Id.* at 842 ¶ 95. *See also* 47 C.F.R. § 79.103(a) note ("Apparatus includes the physical device and the video players that manufacturers install into the devices they manufacture before sale, whether in the form of hardware, software, or a combination of both, as well as any video players that manufacturers direct consumers to install after sale.").

<sup>&</sup>lt;sup>7</sup> See 47 U.S.C. § 303(u)(1) (requiring "that, if technically feasible . . . apparatus designed to receive or play back **video programming** transmitted simultaneously with sound . . . be equipped with built-in . . . capability designed to display closed-captioned video programming" (emphasis added)).

<sup>&</sup>lt;sup>8</sup> 47 U.S.C. § 613(h)(2) (defining "video programming" as "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media").

expressly excludes from the definition of video programming. The overbreadth of this definition is clear when one recognizes that about 92% of digital still cameras consumers buy today can capture video and therefore have a video player for review of user-captured content. There is no benefit to consumers in requiring that digital still cameras with video capture capability support closed captions. Consumers certainly have no expectation of this feature and would find it to be a remarkable government intrusion into product design.

### A. The *IP Captioning Order* Fails to Give Meaning to the "Video Programming" Limitation in the Text of the CVAA

The Order erroneously concludes that any device "built with a video player," and accordingly capable of receiving or playing back "video," is therefore necessarily "designed to receive or play back **video programming** transmitted simultaneously with sound" within the meaning of Section 203 of the CVAA. <sup>10</sup> The CVAA defines "video programming" as "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media." Thus, Congress intended to limit the application of the apparatus closed captioning rules to a subset of video players (*i.e.*, players intended for receiving or playing back "programming by, or generally considered comparable to programming provided by a television broadcast station", rather than **all** video players.

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<sup>&</sup>lt;sup>9</sup> See CEA, CE MarketMetrics, <a href="http://www.ce.org/Research/Products-Services/CE-MarketMetrics.aspx">http://www.ce.org/Research/Products-Services/CE-MarketMetrics.aspx</a>. For more than 80 years, the CE MarketMetrics program has helped companies successfully measure sales performance and plan for the future by tracking factory sales of consumer technology products through U.S consumer sales channels.

<sup>&</sup>lt;sup>10</sup> *IP Captioning Order*, 27 FCC Rcd at 842 ¶ 95 (emphasis added).

<sup>&</sup>lt;sup>11</sup> 47 U.S.C. § 613(h)(2).

<sup>&</sup>lt;sup>12</sup> *Id*.

By failing to impose such a limit, the *IP Captioning Order* impermissibly applies Section 79.103 to **all** devices "with a video player" rather than just those devices designed to receive or play back "video programming," as specified by the plain language of Section 203 of the CVAA. The Commission should limit the applicability of Section 79.103 to devices designed to receive or play back video programming.

### B. The Statutory Term "Designed To" is Unambiguous and Must be Given its Ordinary Meaning

The *IP Captioning Order* misinterprets the term "designed to" in Section 203 of the CVAA. Section 79.103(a) essentially treats "designed to" as meaning "capable of" and thus exceeds the scope of the CVAA. As a result, the apparatus closed captioning rules apply to devices, like camcorders, that are not "designed to" receive or play back video programming transmitted simultaneously with sound, but are "capable of" doing so because they contain a video player.

Contrary to the approach of the *IP Captioning Order*, the Commission must give the unambiguous term "designed to" its ordinary and widely-held meaning. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."<sup>14</sup>

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<sup>&</sup>lt;sup>13</sup> See IP Captioning Order, 27 FCC Rcd at 842 ¶ 95 ("Under our interpretation, if a device is sold with (or updated by the manufacturer to add) an integrated video player *capable* of displaying video programming, that device is 'designed to receive or play back video programming' and subject to our rules adopted pursuant to Section 203." (emphasis added)).

<sup>&</sup>lt;sup>14</sup> See Bennett v. Islamic Republic of Iran, 618 F.3d 19, 22 (D.C. Cir. 2010) (internal quotations and citation omitted). See also American Mining Congress v. EPA, 824 F.2d 1177, 1183 (D.C. Cir. 1987) ("The first step in statutory interpretation is, of course, an analysis of the language itself. As the Supreme Court has often observed, the starting point in every case involving statutory construction is the language employed by Congress. In pursuit of Congress' intent, we start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." (internal quotations and citations omitted)).

As the Supreme Court has explained, the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters. And that rare case must involve, at a minimum, some clear indication of congressional intent, either in the legislative history or in the structure of the relevant statute, that informs the specific language in question; any attempt less grounded in the words of the legislature itself to further what a court perceives to be Congress's general goal in enacting a statute is simply too susceptible to error to be tolerated within our scheme of separated powers. <sup>15</sup>

The Commission, however, fails to provide the required explanation or support for its deviation from the ordinary and widely-held meaning of the unambiguous term "designed to." <sup>16</sup> The term "designed" means "to intend for a definite purpose." <sup>17</sup> In contrast, "capable" means "having the ability or capacity for." <sup>18</sup> By equating "design" with "capable," the *IP Captioning Order* ignores the plain language of the statute and impermissibly removes the manufacturer's intent – the hallmark of the term "design" – as a limitation to the scope of Section 79.103.<sup>19</sup>

<sup>&</sup>lt;sup>15</sup> Conrail v. United States, 896 F.2d 574, 578 (D.C. Cir. 1990) (internal quotations and citations omitted).

 $<sup>^{16}</sup>$  See IP Captioning Order, 27FCC Rcd at 842 ¶ 95 ("Some commenters argue that we should evaluate whether a device is covered by focusing on the original design or intent of the manufacturer of the apparatus and not the consumer's ultimate use of that apparatus. We disagree.").

<sup>&</sup>lt;sup>17</sup> Design Definition, DICTIONARY.COM, <a href="http://dictionary.reference.com/browse/design">http://dictionary.reference.com/browse/design</a> (last visited Apr. 26, 2012). See also Design Definition, MERRIAM-WEBSTER.COM, <a href="http://www.merriam-webster.com/dictionary/design">http://www.merriam-webster.com/dictionary/design</a> ("to have as a purpose: intend") (last visited Apr. 26, 2012); Design Definition, OXFORDDICTIONARIES.COM, <a href="http://oxforddictionaries.com/definition/design?region=us&q=design">http://oxforddictionaries.com/definition/design?region=us&q=design</a> ("do or plan (something) with a specific purpose or intention in mind") (last visited Apr. 26, 2012).

<sup>&</sup>lt;sup>18</sup> Capable Definition, DICTIONARY.COM, <a href="http://dictionary.reference.com/browse/capable">http://dictionary.reference.com/browse/capable</a> (last visited Apr. 26, 2012). See also Capable Definition, MERRIAM-WEBSTER.COM, <a href="http://www.merriam-webster.com/dictionary/capable">http://www.merriam-webster.com/dictionary/capable</a> ("having traits conducive to or features permitting") (last visited Apr. 26, 2012).

<sup>&</sup>lt;sup>19</sup> See, e.g., Public Citizen, Inc. v. Rubber Mfrs. Ass'n, 533 F.3d 810, 816 (D.C. Cir. 2008) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)). Moreover, "[a]pplication of 'broad purposes' of legislation at the

The example of camcorders aptly illustrates the shortcoming of this logical fallacy. Camcorders are designed to create, record, and play back **user-generated** video content.<sup>20</sup> Because at least some camcorders incorporate and support the same technologies (*e.g.*, codecs) needed to enable the playback of pre-recorded "video programming," they are technically capable of doing so for example, if a consumer copies a video file and moves it to the camera. This does not mean, however, that camcorders are in any manner **designed** to receive or playback "video programming" (*i.e.*, "programming by, or generally considered comparable to programming provided by a television broadcast station").<sup>21</sup>

Although the CVAA and the new rules authorize the Commission to waive the new rules for apparatus under certain conditions,<sup>22</sup> the presence of a waiver mechanism alone does not justify or save this aspect of Section 79.103. The waiver mechanism is untried and no requests for waiver of the apparatus closed captioning rules have been filed, let alone granted. More fundamentally, "[t]he FCC cannot save an irrational rule by tacking on a waiver procedure."<sup>23</sup>

expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp

out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.'" *American Mining Congress v. EPA*, 824 F.2d 1177, 1185 n.10 (D.C. Cir. 1987) (quoting *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986)).

Handycam Camcorders,

http://store.sony.com/webapp/wcs/stores/servlet/CategoryDisplay?catalogId=10551&storeId=10151&langId=-1&identifier=S Video Camcorders&facetlist=true (last visited Apr. 13, 2012).

<sup>&</sup>lt;sup>20</sup> See, e.g., Panasonic, Camcorders, <a href="http://shop.panasonic.com/shop/cameras-and-camcorders-camcorders">http://shop.panasonic.com/shop/cameras-and-camcorders-camcorders</a> (last visited Apr. 13, 2012); Samsung, Camcorders, <a href="http://www.samsung.com/us/photography/camcorders">http://www.samsung.com/us/photography/camcorders</a> (last visited Apr. 13, 2012); Sony,

<sup>&</sup>lt;sup>21</sup> 47 U.S.C. §§ 303(u)(1), 613(h)(2).

<sup>&</sup>lt;sup>22</sup> See 47 U.S.C. § 303(u)(2)(C); 47 C.F.R. § 79.103(b)(4).

<sup>&</sup>lt;sup>23</sup> ALLTEL Corp. v. FCC, 838 F.2d 551, 561 (D.C. Cir. 1988) ("ALLTEL Corp.").

Because of the serious flaws in statutory interpretation discussed above, the Commission should not and cannot require manufacturers to apply for waivers of a rule that exceeds the Commission's authority in order to exempt devices from that rule.

Therefore, consistent with Section 203 of the CVAA, CEA urges the Commission to limit the scope of its apparatus closed captioning rules to apply only to apparatus "designed" – and thereby intended – by manufacturers for receiving, playing back, or recording video programming.

C. The Commission Should Reconsider the *IP Captioning Order* and Expressly Limit the Applicability of the Closed Captioning Rules to Only Apparatus With "Video Programming" Players

The Commission should revise Section 79.103(a) and the accompanying note by replacing "video player" with "video programming player." A "video programming player" should be defined as a component, application, or system that is specifically intended by the manufacturer to enable access to video programming, not video in general. This would appropriately limit the scope of covered apparatus to those devices that are specifically designed, and therefore intended by the manufacturer, to enable the playback of video programming, not just video content in general. Thus, for example, a camcorder with a general purpose video player pre-installed would not be covered by Section 79.103 of the rules.

### III. THE COMMISSION SHOULD NOT TREAT "REMOVABLE MEDIA PLAYERS" AS APPARATUS COVERED BY THE CAPTIONING RULES

CEA requests the Commission to reconsider its finding in the *IP Captioning Order* that "removable media players" such as DVD, Blu-ray Disc<sup>TM</sup>, and similar players are apparatus covered by new Section 79.103 of the rules.<sup>25</sup> In extending the closed captioning rules to

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<sup>&</sup>lt;sup>24</sup> See 47 C.F.R. § 79.103(a).

<sup>&</sup>lt;sup>25</sup> See IP Captioning Order, 27 FCC Rcd at 845-846 ¶¶ 99-100; 47 C.F.R. § 79.103(a).

removable media players, the *IP Captioning Order* considers the phrase "apparatus designed to receive or play back video programming transmitted simultaneously with sound," in Section 203(a) of the CVAA and erroneously interprets the term "transmitted simultaneously with sound" to mean how video programming is conveyed from the device (e.g., DVD player) to the end user, rather than how the video programming is sent to the device.<sup>26</sup> The *IP Captioning* Order justifies this interpretation as being necessary to satisfy the captioning requirement of Section 303(u) of the Act, as amended by Section 203(a) of the CVAA, for "apparatus designed to receive or play back video programming transmitted simultaneously with sound."<sup>27</sup>

There are strong public policy reasons against subjecting removable media players to the closed captioning rules, especially because the content on the media (i.e., discs) that these players need to operate is not required to be captioned.<sup>28</sup> Moreover, the *IP Captioning Order*'s interpretation of the phrase "transmitted simultaneously with sound" is inconsistent with Congressional intent and Commission precedent, and is unnecessary to satisfy the requirement of Section 303(u). Indeed, the *IP Captioning Order*'s treatment of removable media players exceeds the Commission's authority. Therefore, the Commission should reconsider the IP Captioning Order's analysis of this issue and find that removable media players are not covered apparatus under the new rules, including Section 79.103.<sup>29</sup>

<sup>&</sup>lt;sup>26</sup> See id. at 845-846 ¶ 99.

<sup>&</sup>lt;sup>27</sup> 47 U.S.C. § 303(u)(1), as amended by CVAA § 203(a) (emphasis added).

<sup>&</sup>lt;sup>28</sup> See IP Captioning Order, 27 FCC Rcd at 846 ¶ 99 n. 398 ("Multimedia, including video programming, which is made available for sale or rent on removable media, is not required to be accessible to individuals with disabilities, such as through the provision of closed captioning.").

<sup>&</sup>lt;sup>29</sup> See 47 C.F.R. §1.429(c). The facts and arguments related to this issue are appropriately raised in this petition for reconsideration because they respond to the overly broad application of the apparatus closed captioning rules regarding removable media players as adopted for the first time in the *IP Captioning Order*. See 47 C.F.R. § 1.429(b)(1), (2). Moreover, consideration of these

#### A. The Public Interest Will Be Served By Reconsideration

As an initial matter, requiring removable media players to conform to Section 79.103 disserves the public interest. Otherwise, this mandate will require manufacturers of removable media players to include technology in their products to decode closed captions as specified in the new rules, even though, as the *IP Captioning Order* acknowledges, the removable media essential to the operation of the players are not even required to contain these closed captions. In fact, the majority of removable media includes subtitles, and an increasing percentage specifically includes subtitles for the deaf and hard of hearing ("SDH"), rather than the new rules' closed captions. Removable media players routinely decode and display these subtitles. Thus, imposing the Section 79.103 closed captioning requirements on these players will provide minimal, if any, benefit to persons with disabilities, who will have access to subtitles regardless of whether closed captioning is available on discs or other removable media. In contrast, reconsideration as requested above will again benefit all consumers by saving substantial, unnecessary industry compliance costs.

facts and arguments serves the public interest by helping ensure the Commission does not act in an *ultra vires* manner. *See id.* § 1.429(b)(3).

<sup>&</sup>lt;sup>30</sup> See IP Captioning Order, 27 FCC Rcd at 846 ¶¶ 99, 100.

Although the removable media essential to the operation of removable media players are not required to be accessible, SDH subtitles are increasingly available on such media. Because content providers mandate full control over the placement of subtitles in their works, SDH does not have all of the user control features of closed captioning. Accordingly, the Commission should recognize that removable media players are not "apparatus designed to receive or play back video programming transmitted simultaneously with sound" as defined by the CVAA, but are designed to only play back removable media that is not subject to the CVAA. For such players, SDH provides accessibility for consumers with disabilities within the design parameters required by content providers.

## B. "Transmitted" Means Sent Across a Distance by "Wire or Radio," Not the Act of Playback by a User

When discussing the phrase "transmitted simultaneously with sound" in connection with removable media players, the *IP Captioning Order* states that the "better reading" of that phrase is "to describe how the video programming is conveyed from the device (*e.g.*, DVD player) to the end user (simultaneously with sound), rather than describe how the video programming arrived at the device (*e.g.*, DVD player)." This interpretation, which essentially equates "transmitted simultaneously with sound" with a consumer's playback of a disc or other removable media, flies in the face of the usual meaning of "transmitted" and is not supported in the CVAA. "Transmitted," and the related terms "transmit" and "transmission," are consistently used in communications statutes to describe how a signal is conveyed or sent over a distance, as in Section 2(a) of the Act, which provides:

The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided....<sup>33</sup>

This usage is consistent with the common dictionary meaning of transmit as an intransitive verb: "to send out a signal either by radio waves or over a wire."<sup>34</sup>

<sup>&</sup>lt;sup>32</sup> *IP Captioning Order*, 27 FCC Rcd at 845 ¶ 99.

<sup>&</sup>lt;sup>33</sup> 47 U.S.C. § 152(a) (emphasis added).

<sup>&</sup>lt;sup>34</sup> See Transmit Definition, MERRIAM-WEBSTER.COM, <a href="http://www.merriam-webster.com/dictionary/transmit">http://www.merriam-webster.com/dictionary/transmit</a> (last visited Apr. 26, 2012). See also Transmit Definition, DICTIONARY.COM, <a href="http://dictionary.reference.com/browse/transmit?s=t">http://dictionary.reference.com/browse/transmit?s=t</a> ("to send or forward, as to a recipient or destination; dispatch; convey") (last visited Apr. 26, 2012); Transmit Definition, OXFORDDICTIONARIES.COM,

http://oxforddictionaries.com/definition/transmit?region=us&q=transmit ("cause (something) to pass on from one place or person to another...broadcast or send out (an electrical signal or a radio or television program): the program was transmitted on October 7") (last visited Apr. 26, 2012).

Congress was well aware of this accepted meaning when it passed the CVAA in October 2010. In fact, multiple sections of the CVAA use the term "transmitted" or "transmit" with no indication that they have the specialized meaning adopted in the *IP Captioning Order*. Thus, for example, Section 2(a)(1) of the CVAA limits liability under the CVAA to the extent a person "transmits, routes, or stores in intermediate or transient storage" certain communications. Section 106(c)(1) requires the EAAC to submit to the Commission "with respect to what actions are necessary as a part of the migration to a national Internet protocol-enabled network to achieve reliable, interoperable communication transmitted over such network that will ensure access to emergency services by individuals with disabilities." The meaning of "transmit" in both of these provisions clearly is to send out a signal over a distance.

Even more telling, Section 201(e)(2)(F) of the CVAA directs the VPAAC to make a recommendation with respect to user interfaces:

for the standards, protocols, and procedures used to enable the functions of apparatus designed to receive or display video programming transmitted simultaneously with sound (including apparatus designed to receive or display video programming transmitted by means of services using Internet protocol) to be accessible to and usable by individuals with disabilities.<sup>38</sup>

Congress's use of the term "transmitted simultaneously with sound" in this provision of the CVAA means video programming that is sent over a distance by wire or radio, including by

<sup>&</sup>lt;sup>35</sup> See CVAA §§2(a)(1) (limitation on liability); 106(c)(1) (establishing the Emergency Access Advisory Committee ("EAAC") and specifying its recommendations); 201(e)(2)(F) (establishing the Video Programming and Emergency Access Advisory Committee ("VPAAC") and specifying its recommendations); and 202(a) (modifications to reinstated video description regulations).

<sup>&</sup>lt;sup>36</sup> CVAA § 2(a)(1) (emphasis added).

<sup>&</sup>lt;sup>37</sup> *Id.* §106(c)(1) (emphasis added).

<sup>&</sup>lt;sup>38</sup> *Id.* § 201(e)(2)(F) (emphasis added).

means of services using IP. But the *IP Captioning Order* did not even acknowledge this provision of the CVAA in its discussion of removable media players.

In addition, Section 202(a) of the CVAA requires modifications to the video description rules to be reinstated by the Commission, providing that those regulations "shall apply to video programming, as defined in subsection ... insofar as such programming is **transmitted for display on television in digital format**." In the August, 2011 *Video Description Order*, which implemented Section 202(a), the Commission consistently treated the term "transmitted" as meaning sent over a distance by wire or radio and did not restrict it to a playback function, as seen in paragraph 57: "[t]he *NPRM* did not specifically seek comment on the application of the rules to Mobile DTV, but insofar as it is **used by a network-affiliated broadcaster to transmit programming for display on television**, it is subject to these rules."

Congress was consistent in its understanding of the term "transmitted," even in other nearly contemporaneous communications legislation, and the Commission should conform to this understanding by altering its analysis in the case of removable media players. The term "transmitted" as now used in the *IP Captioning Order* with respect to removable media players does not square with Congress's consistent use of the term, as implemented by the Commission itself.

In fact, just over two months after passage of the CVAA, in December 2010, the same Congress passed the Commercial Advertisement Loudness Mitigation ("CALM") Act.<sup>42</sup> The CALM Act required the Commission to incorporate into its rules by reference and make

<sup>&</sup>lt;sup>39</sup> *Id.* § 202(a) (emphasis added).

<sup>&</sup>lt;sup>40</sup> See Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, 26 FCC Rcd 11847 (2011) ("Video Description Order").

<sup>&</sup>lt;sup>41</sup> *Id.* at 11875 ¶ 57 (emphasis added).

<sup>&</sup>lt;sup>42</sup> Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. § 621) (Dec. 15, 2010).

mandatory a technical standard designed to prevent digital television commercial advertisements from being "transmitted" at louder volumes than the program material they accompany. <sup>43</sup> In the *CALM Act Order*, adopted a few weeks before the *IP Captioning Order*, the term "transmitted" clearly means sending content over a distance from a broadcast station or MPVD to a consumer, not, *e.g.*, from a television set to the consumer. For example, paragraph 1 of the *CALM Act Order* states:

[W]e will require **broadcast stations and MVPDs** to ensure that all commercials are **transmitted to consumers** at the appropriate loudness level in accordance with the industry standard. In the event of a pattern or trend of complaints, stations and MVPDs will be deemed in compliance with regard to their locally inserted commercials if they demonstrate that they use certain equipment in the ordinary course of business.<sup>44</sup>

Here again, and unlike the *IP Captioning Order*, the term "transmitted" means what Congress has consistently intended: sent at a distance by wire or radio, not as part of consumer's playback of a disc or other fixed media. The Commission should alter its contrary interpretation of this term with respect to removable media devices.

### C. Congressional Intent Regarding Sections 202 and 203 of the CVAA Does Not Support the *IP Captioning Order*'s Treatment of Removable Media Players

Congress intended Section 203 of the CVAA to expand the coverage of the closed captioning rules, but not by extending captioning requirements to removable media players.

Rather, Congress meant to extend coverage to devices that play back content that was sent to the device by means (e.g., via IP) other than traditional broadcasting or cable service. The IP Captioning Order recognizes that in Section 203(a) of the CVAA, Congress amended Section 303(u) of the Act, which previously required caption decoder capability for "apparatus designed"

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<sup>&</sup>lt;sup>43</sup> See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, 26 FCC Rcd 17222 (2011) (the "CALM Act Order").

<sup>&</sup>lt;sup>44</sup> *Id.*, 26 FCC Rcd at 17223 ¶ 1 (emphasis added).

to receive television pictures broadcast simultaneously with sound,"<sup>45</sup> by substituting the phrase "or play back video programming transmitted" for "television pictures broadcast."<sup>46</sup>

In the context of the CVAA, the effect of this amendment is clear. Section 202(b) of the CVAA requires closed captioning for video programming transmitted by IP.<sup>47</sup> Section 203's amendment thus means that devices that "receive or play back video programming transmitted simultaneously with sound," including video programming transmitted via IP, must be able to decode captions. Hence, Congress meant to require devices that play back captioned video programming delivered via the Internet to be able to decode the captions.

The *IP Captioning Order* does not justify its unusual reading of Section 203(a) other than to say that Congress's amendment "was intended to expand the scope of the statute beyond devices that receive broadcast television without narrowing the statute's prior coverage." Yet this intent is best satisfied, consistent with the provisions of the CVAA, not by extending captioning requirements to removable media players, but rather by applying them to devices that play back captioned video programming delivered via the Internet. This conclusion is further confirmed by the fact that the CVAA does not extend the Section 79.103 closed captioning obligations to video programming provided on removable media (*e.g.*, DVD or Blu-ray Disc<sup>TM</sup>). Without such obligations on removable media, requiring manufacturers to include

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<sup>&</sup>lt;sup>45</sup> 47 U.S.C. § 303(u). *See also* 47 C.F.R. § 15.3(w) (defining "[t]elevision (TV) broadcasting receiver" as a "device designed to receive television pictures that are broadcast simultaneously with sound....")

<sup>&</sup>lt;sup>46</sup> *IP Captioning Order*, 27 FCC Rcd at 845 ¶ 99.

<sup>&</sup>lt;sup>47</sup> See CVAA § 202(b).

<sup>&</sup>lt;sup>48</sup> *IP Captioning Order*, 27 FCC Rcd at 845  $\P$  99.

<sup>&</sup>lt;sup>49</sup> *Id.* at 846 ¶ 99 n.398.

closed captioning functionality, as specified in Section 79.103, in removable media players creates little, if any, benefit for the deaf and hard-of-hearing community.

In comparison, DVRs are examples of devices that are clearly designed to "receive or play back video programming transmitted simultaneously with sound."<sup>50</sup> The Commission should clarify that these devices, rather than removable media players (*e.g.*, standalone DVD and Blu-ray Disc<sup>TM</sup> players), are covered apparatus under Section 79.103. This is consistent with Section 204 of the CVAA, which applies to user interfaces on digital apparatus. Section 204 amends Section 303 of the Act to require that:

[I]f achievable...digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound, including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol, be designed, developed, and fabricated so that control of appropriate built-in apparatus functions are accessible to and usable by individuals who are blind or visually impaired....<sup>51</sup>

In Section 204, Congress therefore recognized that the class of "apparatus designed to receive or display video programming transmitted in digital format using Internet protocol" is included within the class of "apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound." Moreover, the video programming played back on a DVR is required to contain closed captioning, unlike the programming played back on a removable media player.

Contrary to the *IP Captioning Order*,<sup>52</sup> there is no compelling reason to require removable media players to support the closed captioning specified in the new rules when these

<sup>&</sup>lt;sup>50</sup> The CVAA thus addresses two changes in the video programming industry: the advent of DVRs and the introduction of IP-delivered video. The DVRs' time-shifting capabilities are covered by the "receive or playback" language. The move to IP-delivered video is covered by the "transmitted" language.

<sup>&</sup>lt;sup>51</sup> CVAA § 204(a) (emphasis added).

<sup>&</sup>lt;sup>52</sup> *IP Captioning Order*, 27 FCC Rcd at 846 ¶ 99 n.398

devices can and do support accessibility for removable media content. Indeed, the Described and Captioned Media Program, which the *IP Captioning Order* cites as an authoritative source, <sup>53</sup> considers SDH subtitles to be a form of "captioning" for video content. <sup>54</sup> Moreover, Section 303(u) of the Act, as amended by Section 203 of the CVAA, does not specifically require that devices include user control features for manipulating closed captions in all video programming players, but only that such apparatus "be equipped with built-in closed caption decoder circuitry or capability designed to **display** closed-captioned video programming." Thus, removable media players that support SDH subtitles do in fact meet the baseline captioning requirements of the CVAA for removable media (*e.g.*, DVD or Blu-ray Disc<sup>TM</sup>), even though such players were **not designed** to receive or playback "video programming" as defined by the CVAA. <sup>56</sup> Requiring closed captioning, as specified in Section 79.103, in these devices is unnecessary.

## D. The *IP Captioning Order*'s Treatment of Removable Media Players Exceeds the Commission's Authority

The *IP Captioning Order*'s interpretation of Section 203 in this context extends beyond the limits of the Commission's statutory authority. This is not surprising, because, as shown above, Congress did not extend, or mean to extend, the Commission's jurisdiction in this area to removable media devices.<sup>57</sup> The *IP Captioning Order* bases its authority over removable media players on the phrase "transmitted simultaneously with sound," which means "how the video

<sup>&</sup>lt;sup>53</sup> See id.

<sup>&</sup>lt;sup>54</sup> See Shannon Chenoweth, What are Captions?, Described and Captioned Media Program, at 1-2, available at <a href="http://www.dcmp.org/caai/nadh170.pdf">http://www.dcmp.org/caai/nadh170.pdf</a> (last visited Apr. 26, 2012).

<sup>&</sup>lt;sup>55</sup> 47 U.S.C. § 303(u)(1)(a) (emphasis added).

<sup>&</sup>lt;sup>56</sup> See 47 U.S.C. § 613(h)(2).

Thus, as discussed above, the *IP Captioning Order*'s untried waiver process, *see* 47 C.F.R. § 79.103(b)(4), cannot save the extension of the new rules to removable media players. *See ALLTEL Corp.*, 838 F.2d at 561.

programming is conveyed from the device ... to the end user."<sup>58</sup> Yet the Commission's authority over such "transmission," or playback by a consumer, is not established by the CVAA, which, as discussed above, focuses on traditional transmissions over distance. In fact, the general grant of jurisdiction in Section 2(a) of the Act,<sup>59</sup> which the CVAA did not amend, specifies that the Commission's powers extend only to "interstate and foreign communication by wire or radio," <sup>60</sup> and does not extend to the playback function of a consumer electronics device designed to play back content that is outside the scope of the Commission's authority. <sup>61</sup> The *IP Captioning Order*'s unusual interpretation of "transmitted simultaneously with sound" is not within the Commission's general jurisdiction over interstate communications by wire or radio.

Nor can the Commission properly exercise its ancillary jurisdiction to cover such apparatus. As recently as 2005, the D.C. Circuit concluded that "the FCC may not lawfully exercise jurisdiction over activities that do not constitute communication by wire or radio."

<sup>58</sup> *IP Captioning Order*, 27 FCC Rcd at 845 ¶ 99.

<sup>&</sup>lt;sup>59</sup> 47 U.S.C. § 152(a).

The *IP Captioning Order* addresses Congress' use of the term "or" in the phrase "receive or playback" in Section 203(a) of the CVAA. *See IP Captioning Order*, 27 FCC Rcd at 845 ¶ 99. The use of the term "or" does not expand the scope of the Commission's regulatory authority to include devices that do not transmit or receive communication by wire or radio. *See Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. 395 (1975) (finding that the insertion of the disjunctive "or" in the place of the conjunctive "and" in the phrase "surplus water or water power from any government dam" was not alone sufficient to indicate an intent on the part of Congress to expand the limited scope of the Federal Power Commission's surplus water licensing authority).

<sup>&</sup>lt;sup>61</sup> See IP Captioning Order, 27 FCC Rcd at 846 n. 398 ("Multimedia, including video programming, which is made available for sale or rent on removable media, is not required to be accessible to individuals with disabilities, such as through the provision of closed captioning.").

<sup>&</sup>lt;sup>62</sup>Am. Library Ass'n v. FCC, 406 F.3d 689, 704 (D.C. Cir. 2005) (discussing the Commission's lack of ancillary jurisdiction to regulate consumer electronic devices when those devices are not engaged in the process of radio or wire transmission); see also Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) (vacating the Commission's use of ancillary authority to regulate an Internet service provider's network management practices).

# IV. THE COMMISSION SHOULD SPECIFY THAT THE JANUARY 1, 2014 COMPLIANCE DEADLINE REFERS ONLY TO THE DATE OF MANUFACTURE

CEA applauds the Commission for providing a deadline of January 1, 2014, for compliance with the apparatus closed captioning rules.<sup>63</sup> However, CEA urges the Commission to clarify that the compliance deadline refers specifically to the date of manufacture, so that apparatus manufactured on or after January 1, 2014 are subject to the new rules, without affecting the importing, shipping, or sale of apparatus manufactured before that date. The requested clarification will simplify manufacturers' compliance with the apparatus closed captioning rules without limiting the accessibility of new apparatus. Moreover, the requested clarification is consistent with the Commission's past practices regarding similar equipment compliance deadlines.<sup>64</sup>

Under Sections 79.103(a) and 79.104(a) of the new rules, the January 1, 2014 deadline expressly applies to apparatus "manufactured in the United States or imported for use in the United States." This phrase echoes Sections 303(u)(1) and (z)(1) of the Act, as amended by Sections 203(a) and (b) of the CVAA. However, without clarification, this phrase could be

 $<sup>^{63}</sup>$  See IP Captioning Order, 27 FCC Rcd at 859 ¶ 122; 47 C.F.R. §§ 79.101(a)(2), 79.102(a)(3), 79.103(a), and 79.104(a) (effective Apr. 30, 2012) (providing for January 1, 2014, compliance deadline).

<sup>&</sup>lt;sup>64</sup> The facts and arguments raised by CEA related to this issue are appropriately raised in this petition for reconsideration because they respond to the specifics of the compliance deadline as adopted for the first time in the *IP Captioning Order. See* 47 C.F.R. § 1.429(b)(1), (2). Moreover, consideration of these facts and arguments serves the public interest by helping to simplify compliance with the new rules without limiting apparatus accessibility. *See id.* § 1.429(b)(3).

<sup>&</sup>lt;sup>65</sup> See 47 C.F.R. §§ 79.103(a) and 79.104(a) (effective April 30, 2012). The January 1, 2014 deadline also appears, with slightly different wording, in Sections 79.101(a)(2) and 79.102(a)(3). See 47 C.F.R. §§ 79.101(a)(2), 79.102(a)(3).

<sup>&</sup>lt;sup>66</sup> See 47 U.S.C. § 303(u)(1), (z)(1).

read as meaning that the apparatus closed captioning rules will apply by date of importation, rather than date of manufacture. In contrast, the rules governing equipment compliance deadlines for digital closed captioning,<sup>67</sup> V-chip implementation,<sup>68</sup> and analog captioning<sup>69</sup> apply only to devices **manufactured** on or after the deadline, specifically by including notes explaining that the relevant paragraphs place no restriction on the shipping or sale of covered equipment manufactured before the deadline date.

The public interest benefits of a compliance deadline based on date of manufacture (as opposed to date of importation) are clear. Manufacturers can identify and control the date on which they manufacture apparatus. However, the date of importation is subject to variables that are out of the control of manufacturers, such as shipping times, customs delays and security requirements at the point of importation. As a result, a manufacturer could easily ship a product from outside the United States with the good faith expectation that it would arrive, and be imported, in compliance with the deadline, only to learn after the fact that the product did not comply because it was imported later than expected. The lack of a manufacturing deadline provides no consumer benefit, but creates unnecessary compliance risks for manufacturers.

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<sup>&</sup>lt;sup>67</sup> See Notes to 47 C.F.R. § 15.122(a)(1), (2) (2011), redesignated as id. § 79.102(a)(1), (2), (effective Apr. 30, 2012); see also Closed Captioning Requirements for Digital Television Receivers; Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, 15 FCC Rcd 16788, 16808 ¶ 58 (2000) (holding that "the compliance date refers to the date when television receivers must be manufactured with the decoder circuitry, not when televisions must be available for sale to consumers" (footnote omitted)).

<sup>&</sup>lt;sup>68</sup> See Note to 47 C.F.R. § 15.120(a). In adopting the V-chip compliance deadline, the Commission clearly indicated that it was based on date of manufacture, stating that "this deadline should cause little disruption because it applies to the date the receivers are produced." *Technical Requirements to Enable Blocking of Video Programming based on Program Ratings; Implementation of Sections* 551(c), (d), and (e) of the Telecommunications Act of 1996, 13 FCC Rcd 11248, 11257 ¶ 23 (1998).

 $<sup>^{69}</sup>$  See Note to 47 C.F.R. § 15.119(a) (2011), redesignated as id. § 79.101(a)(1) (effective Apr. 30, 2012); see also Amendment of Part 15 of the Commission's rules to Implement the Provisions of the Television Decoder Circuitry Act of 1990, 7 FCC Rcd 2279 ¶ 4 (1992).

CEA therefore requests the Commission to clarify similarly that the January 1, 2014 deadline for the apparatus closed captioning rules refers specifically to date of manufacture. CEA urges the Commission to add explanatory notes to Sections 79.103(a) and 79.104(a), as well as Sections 79.101(a)(2) and 79.102(a)(3), stating that the new obligations in those rule provisions "place no restriction on the importing, shipping or sale of apparatus that were manufactured before January 1, 2014." This proposed language closely follows the relevant statutory language of the CVAA<sup>70</sup> as well as the earlier notes.

#### V. CONCLUSION

CEA respectfully requests that the Commission reconsider the three foregoing issues as requested above.

Respectfully submitted,

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<sup>70</sup> See CVAA § 203(a), (b) (applying to apparatus "manufactured in the United States or imported for use in the United States").

#### DECLARATION OF BRIAN E. MARKWALTER

I, Brian E. Markwalter, Senior Vice President, Research and Standards of the Consumer Electronics Association, declare under penalty of perjury that the contents of the foregoing Petition for Reconsideration are true and correct to the best of my knowledge and belief.

Executed on April 30, 2012.

/s/ Brian E. Markwalter
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